NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2586-11T1

MIRIAM A. RUDAY,

Plaintiff-Appellant,

v.

SHORE MEMORIAL HOSPITAL,

Defendant-Respondent.

Argued October 17, 2012 - Decided January 30, 2013

Before Judges Grall and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-485-09.

Donald G. Targan argued the cause for appellant (Targan & Pender, attorneys; Mr. Targan and Michael J. Pender, on the brief).

Timothy M. Crammer argued the cause for respondent (Crammer, Bishop & O'Brien, attorneys; Mr. Crammer, on the brief).

PER CURIAM

Plaintiff Miriam A. Ruday filed an action seeking damages for injuries she sustained when she climbed over the raised rail on her hospital bed and fell. Because she was assessed to be at a high risk of falling, she was given a bed equipped with an

alarm that sounds when the patient attempts to get out of bed and allows Hospital staff to intervene. The alarm, however, was not turned on when plaintiff fell. On that basis, plaintiff alleged negligence, naming unknown employees of Shore Memorial Hospital and the Hospital as defendants.

On an interlocutory appeal, we affirmed the trial court's denial of plaintiff's motion to amend her complaint to name the Hospital employees involved in her care. The panel concluded that she failed to exercise due diligence in identifying them as required by Rule 4:26-4. Ruday v. Shore Mem. Hosp., No. A-3646-10 (App. Div. Oct. 18, 2011) (slip op. at 10).[1] On January 10, 2012, the Supreme Court denied plaintiff's motion for leave to appeal. Ruday v. Shore Mem. Hosp., M-629, September Term 2011, 069512. Thus, plaintiff's claim against the Hospital survived for further proceedings in the trial court.

Plaintiff now appeals a grant of summary judgment in favor of the Hospital. The evidence presented on the motion, viewed in the light most favorable to plaintiff and with the benefit of all favorable inferences, is sufficient to permit a jury to find that one of the Hospital's employees breached a duty of care

[1] We also affirmed the court's determination that plaintiff could not receive damages in excess of $250,000 because the Hospital was entitled to the protection of the Charitable Immunity Act, N.J.S.A. 2A:53A-7 to -11. Id. at 11-12.

owed to plaintiff and that the breach, which increased the risk of plaintiff's fall, was a substantial factor in bringing about the resulting injury. Thus, the Hospital was not entitled to judgment as a matter of law, and the judgment must be reversed. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Plaintiff, an eighty-six-year-old woman, fell at home and as a consequence was admitted to Shore Memorial Hospital on January 1, 2008. Using a "risk assessment tool" copyrighted by Johns Hopkins Hospital, plaintiff was determined to be at high risk of falling. A patient with a score higher than ten falls within that category, and plaintiff's score was twenty-two.

The Hospital has a protocol for patients whose condition poses a high risk of falling. The "interventions" — measures to minimize the risk of fall — are set forth on the risk assessment form. According to the Hospital employees who were deposed and explained the protocol, the interventions were put in place for plaintiff. High-risk patients are placed in beds equipped with alarms that sound when the patient moves, the purpose being to alert staff that the patient is attempting to climb out of bed. The bed alarms are turned on and off with a switch that has a cover which must be lifted to press the switch. The covered switch is located on a panel at the foot of the bed. When the

alarm is on, a small light on the bed's foot board is illuminated, and the light is visible from the hallway. Thus, the light indicating that the alarm is activated is visible from the room and the hallway. In addition, there are yellow tags placed outside the door to indicate that the patient is at high risk of falling.

Because the bed alarm sounds with movement, an employee attending to the patient turns it off before moving the patient in bed and must reset it on leaving the room. As one nurse acknowledged, making sure the alarm is activated on leaving the room of a patient at high risk of falling is "absolutely" an important thing for a nurse to do — one of a nurse's "ABCs."

The nurses attending plaintiff changed shifts at 7:00 p.m. on January 1, the day she was hospitalized. At change of shift, the arriving nurse receives a report on the patients. When the night shift started, plaintiff was sitting in a chair. The night nurse put plaintiff to bed at about 8:30 p.m. and assessed her condition at 11:41 p.m. and again at 4:00 a.m. on January 2. The night nurse had an assistant, and they were both in and out of the room. The assistant had taken the patient's vital signs during the evening.

At 5:30 a.m., plaintiff cried out for help and was found on the floor next to her bed. The rails on her hospital bed were

still raised, but the alarm had not sounded. There is no dispute that plaintiff was injured in the fall.

The Hospital acknowledged that its investigation of the incident disclosed that the alarm "was not activated at the time when the fall occurred." Moreover, there is no evidence suggesting that the alarm malfunctioned.

According to the Hospital's investigator, the nurse and her assistant both recalled resetting the alarm when they left plaintiff's room. On this record, which includes only portions of the deposition testimony, it is not clear whether the nurse testified that she reactivated the alarm during her deposition. And the record does not include a deposition of the assistant.

There is no information indicating that any person other than an employee of the Hospital had access to the alarm on plaintiff's bed between the last check of her condition at 4:00 a.m. and her 5:30 a.m. cry for help. For example, the record is silent on visiting hours and the number of patients in plaintiff's hospital room.

Without question, plaintiff cannot establish that the Hospital is vicariously liable for her injury without evidence that would permit a jury to reasonably infer that the negligence of its employees contributed to her injury. Negligence may not be presumed. Myrlak v. Port Auth. of N.Y. & N.J., 157 N.J. 84,

95 (1999). And its proof in this case required evidence sufficient to support a finding that an employee of the Hospital breached a duty of care owed plaintiff and that the breach was a substantial factor in bringing about her injury. Verdicchio v. Ricca, 179 N.J. 1, 24 (2004).

"As health-care professionals, [Hospital employees who cared for plaintiff prior to her fall] assumed a duty to exercise that degree of care for plaintiff that would have been exercised by any reasonable member of the profession under the same circumstances." Tobia v. Cooper Hosp. Uni. Med. Ctr., 136 N.J. 335, 342 (1994). A hospital protocol can establish a standard of care for its employees. See ibid. (concluding that a similar hospital protocol concerning patients on gurneys established the standard of care for the hospital's attending physicians). Moreover, as an employer, the Hospital "is subject to liability for torts committed by employees while acting within the scope of their employment." Restatement (Third) of Agency § 2.04 (2006) (respondeat superior); see also § 2.04 comment b (noting that "the doctrine applies to acts . . . that are the consequence of inattentiveness" and is most commonly applied in cases involving "negligence resulting in physical injury").

Here the existence of the Hospital's protocol was established by the deposition testimony of its employees. In addition, the preventive interventions to be undertaken to fulfill the duty were listed on a risk assessment instrument promulgated by Johns Hopkins and utilized by the Hospital.

Generally negligence cannot be established by proof of injury attributable to some unidentified person. But a plaintiff need not exclude all possible persons to reach the jury, "it is enough that [the plaintiff] makes out a case from which the jury may reasonably conclude that the negligence was, more probably than not, that of the defendant." Restatement (Second) of Torts § 328D comment f (1965).

On the foregoing reasoning, in the context of vicarious liability for negligence, proof that the negligence was, more probably than not, that of one or more of the defendant's employees suffices. One rationale for liability under principles of respondeat superior is that this basis for liability serves as "an incentive for [employers] to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct," which is an "incentive [that] may reduce the incidence of tortious conduct more effectively than doctrines that impose liability solely on an individual tortfeasor." Restatement (Third) of Agency, supra,

§ 2.04 comment b. That goal would be defeated if employers could escape liability solely because a plaintiff, who has proof permitting a finding that the negligence was more probably than not that of one of several of the defendant's employees, could not identify the employee or employees who were negligent. At least that is so in a case where there is no evidence suggesting that the negligence is probably that of a person who is not an employee of the defendant. Cf. Anderson v. Somberg, 67 N.J. 291, 302 (developing a rule for proving liability in a case involving an injury in the course of surgery that bespoke the negligence of defendants who had roles ranging from the production of the surgical instrument to participation in the surgery), cert. denied, 423 U.S. 929, 96 S. Ct. 279, 46 L. Ed. 2d 258 (1975).

Our courts have long recognized that proof giving rise to an inference of negligence is adequate to permit a plaintiff to reach a jury. Res ipsa loquitur is one of the doctrines utilized. It applies to establish an inference of negligence where: (1) the occurrence bespeaks it; (2) the instrumentality was within the defendant's exclusive control; and (3) there is no indication that it was the plaintiff's fault. Cockerline v. Mendez, 411 N.J. Super. 596, 611 (App. Div.), certif. denied, 201 N.J. 499 (2010).

On this record, with reliance on inferences that underlie res ipsa loquitur, plaintiff is entitled to reach the jury. This occurrence is "of a kind which ordinarily does not occur in the absence of negligence." Restatement (Second) of Torts, supra, § 328D(1)(a). The Hospital's protocol required plaintiff, who was at high risk of falling, to be given a bed equipped with an alarm that would be turned on when plaintiff was left alone. See id. at comment e. The purpose of this component of the Hospital's protocol is to permit protective intervention by its employees in the event plaintiff attempted to get out of bed. But that alarm was not on when plaintiff, who was left unattended, climbed over the rail of her bed and fell between 4:00 a.m. and 5:30 a.m.

The conclusion that the employees attending to plaintiff's care had exclusive control over the switch for her bed alarm is also inferable from this record. Recognizing that there is no evidence about the Hospital's visiting hours or whether there was another patient in her room, the switch had a cover that had to be lifted in order to turn the alarm on and off. But, there is nothing in the record that suggests that anyone but a Hospital employee had access to the room, let alone the covered switch at the foot of the bed visible from the hallway that is

used to turn the alarm on and off, between 4:00 a.m. and 5:30 a.m. on January 2.

Finally, the evidence about movement that sounds the alarm does not permit an inference that plaintiff could have turned the alarm off between 4:00 a.m. and her fall without sounding the alarm. One can infer that if a nurse shuts off the alarm before moving a patient in bed, the alarm would be sounded by a patient's attempt to get out of bed.

More importantly, in this case plaintiff's conduct was irrelevant to the Hospital's liability. The Hospital, through its staff, had a duty to exercise reasonable care to prevent plaintiff from harming herself in a fall, making plaintiff's role in causing the fall immaterial to the negligence of the Hospital's employees who attended to her and, more probably than not, left her without checking to see if the light, indicating that the alarm was on, was illuminated. See Tobia, supra, 136 N.J. at 342.

For the foregoing reasons, the Hospital was not entitled to judgment as a matter of law. Brill, supra, 142 N.J. at 540. Accordingly, the order awarding the Hospital summary judgment must be reversed.

We recognize that in concluding otherwise, the trial court relied on observations this court made, in dicta, on the

interlocutory appeal addressing the denial of plaintiff's motion to amend her complaint and whether the occurrence bespoke negligence. This case, however, must be decided on the evidential materials submitted on the summary judgment motion. The prior dicta, appearing in a discussion of the applicability of the rule of Anderson to the liability of the individual employees, whom plaintiff identified too late to permit amendment of her complaint due to her lack of due diligence, did not control the decision on the Hospital's subsequent motion for summary judgment.

The judgment is reversed and the matter is remanded for further proceedings.